Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

YMCA OF METROPOLITAN CHICAGO AND TERRELL C. SANDERSON,

Petitioners,

v.

U.S. BANK, AS TRUSTEE OF THE ROE ANN LOCKHART OBRA '93 TRUST, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, First District

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Over fifty years ago, this Court held that "[a] trial court should not decide and take final action *ex parte* on information . . . received [from a juror], but should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate." *Remmer v. United States*, 347 U.S. 227, 229-30 (1954). Petitioners were defendants in a negligence action and, following a jury trial, received a general verdict in their favor. During trial, the judge had multiple *ex parte* conversations with a deputy sheriff, who allegedly reported that the jury was "in disbelief" from hearing "outbursts" from petitioners' counsel in sidebar conversations. App., *infra*, 34a. The alleged communications between the jury, the deputy sheriff, and trial judge occurred outside the parties' presence and were not revealed to petitioners at any time prior to the verdict. Nevertheless, nearly ten months after the jury was dismissed, the trial judge made factual findings of juror prejudice based on the previously undisclosed *ex parte* contacts and awarded the plaintiff a new trial.

The question presented is whether the Due Process Clause prohibits a trial judge from issuing a ruling that affects substantial rights in reliance on information derived from an *ex parte* communication.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In addition to the parties named in the caption, the Roe Ann Lockhart OBRA '93 Trust was a plaintiff-appellee in the Appellate Court of Illinois and is a respondent in this Court.

Pursuant to this Court's Rule 29.6, undersigned counsel state that YMCA of Metropolitan Chicago has no parent corporation, and that no publicly held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners YMCA of Metropolitan Chicago and Terrell C. Sanderson (collectively, "YMCA") respectfully submit this petition for a writ of certiorari.

OPINIONS BELOW

The opinion of the Appellate Court of Illinois, First District (App., *infra*, 1a-25a) is not yet published but is electronically reported at 2008 WL 5454246. The order of the Supreme Court of Illinois denying YMCA's petition for leave to appeal (App., *infra*, at 28a) is published at 232 Ill. 2d 597.

JURISDICTION

The opinion of the Appellate Court of Illinois, First District, was entered on December 31, 2008. The order of the Supreme Court of Illinois denying leave to appeal was entered on May 28, 2009. On August 10, 2009, Justice Stevens extended the time for filing a petition for a writ of certiorari until October 10, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

U.S. Const. amend. XIV, § 1.

STATEMENT

This Court has held that *ex parte* communications between a judge and juror are "presumptively prejudicial." *Remmer v. United States*, 347 U.S. 227,

229 (1954). Indeed, such communications violate the Due Process Clause whenever the defendant's presence has a "relation, reasonably substantial," to the opportunity to mount a full and fair defense. *United States v. Gagnon*, 470 U.S. 522, 526 (1985) (*per curiam*) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105-06, 108 (1934)); *see also Willner v. Comm. on Character & Fitness*, 373 U.S. 96, 103 (1963). This case presents the question whether due process is violated when a trial judge bases a judgment-altering ruling on *ex parte* communications from the jury—an important federal question that has divided the state appellate courts.

The trial court violated the YMCA's due process rights by basing factual findings of juror prejudice on undisclosed *ex parte* communications and using those findings to invalidate a jury verdict and grant the plaintiff a new trial. The appellate court then rejected the YMCA's due process challenge to the new-trial order, holding that a trial court is entitled to rely on *ex parte* conversations as long as the record does not "directly contradict[]" the trial judge's "recollection" of those discussions. App., *infra*, 14a. The appellate court's holding—that a trial judge has broad discretion to rely on *ex parte* communications as long as there is no contrary record evidence—turns this Court's presumption against the use of *ex parte* evidence on its head. The appellate court's opinion conflicts with numerous precedents of this Court, such as *Snyder*, *Willner*, and *Gagnon*, as well as opinions from several state supreme courts. This Court should grant review to resolve the split in authority and to clarify that a trial judge cannot rely on *ex parte* communications to alter the outcome of a trial.

A. Proceedings In The Trial Court

Respondent U.S. Bank ("plaintiff"), as guardian and representative of the estate of Roe Ann Lockhart, sued the YMCA in negligence for damages sustained in a traffic accident. App., *infra*, 2a. The case went to trial in the Circuit Court of Cook County, Illinois, and on May 5, 2004, the jury returned a general verdict for the YMCA. *Id.* at 31a.

After the verdict, plaintiff moved for a new trial, raising a variety of grounds, including an assertion (made for the first time in the case) that the YMCA's counsel had made accusations of unfair treatment in sidebar conversations that were audible to the jury. *Id.* at 3a-4a. On September 7, 2004, the trial court held a hearing on plaintiff's motion. There was no mention, either before or during the hearing, of any *ex parte* communications with the jury concerning defense counsel's allegedly prejudicial statements.

The court did not rule on plaintiff's motion immediately; rather, over a month later, the court *sua sponte* ordered the parties to submit to mediation—which failed to reach a settlement. *Id.* at 4a. Then, on February 25, 2005, after settlement negotiations had reached a stalemate and nearly ten months after the jury was dismissed, the court vacated the judgment on the verdict and ordered a new trial. *Id.* at 32a-35a.

The trial court based its new-trial ruling on its finding that the jury had overheard, and was prejudiced by, off-the-record comments made by the YMCA's counsel in sidebar conversations. Although the court asserted that the transcript was "replete" with "prejudicial comments and actions," it did not identify any in its ruling. *Id.* at 33a. Rather, the court found that the contentious sidebar conversations were audible to the jury based in part on his own "direct observation," which "the transcript . . .

does not reflect," of the court's efforts to prevent the jury from overhearing. *Id.* He further found—on the basis of multiple *ex parte* conversations with the courtroom's deputy sheriff (who served as bailiff and in turn was reporting his alleged *ex parte* conversations with jurors) that the allegedly overheard remarks were prejudicial in light of their impact on the jury:

> [T]he comments off the record that the jurors heard were very prejudicial to the Plaintiff, as reported on several occasions by the sheriff to myself that the jury was in disbelief from hearing these outbursts.

Id. at 34a.

The court did not alert the parties or their counsel to the *ex parte* comments during the trial, after the verdict, at the hearing on post-trial motions, or at any time in the ten months between the jury's dismissal and the new-trial ruling. Therefore, as the court conceded, it was impossible to know whether the sidebar comments affected the outcome of the trial: "The outcome, the verdicts could have, might have been the same. I and we will never know." *Id.*

The YMCA promptly sought leave to appeal the new-trial order to the Appellate Court of Illinois, arguing *inter alia* that the trial court's reliance on secret, *ex parte* communications with members of the jury violated the YMCA's "due process rights to a fair and open proceeding." YMCA Pet. for Leave to Appeal Pursuant to Sup. Ct. R. 306(a)(1) at 17. The appellate court denied leave to appeal the interlocutory order. App., *infra*, 2a. The YMCA then sought leave to appeal the order to the Supreme Court of Illinois, again raising the due process issue. YMCA Pet for Leave to Appeal Pursuant to Sup. Ct. R. 315(a) at 11. The Supreme Court of Illinois likewise denied leave to appeal. App., *infra*, 2a.

Thereafter, a second trial followed before a different jury, which resulted in a verdict for plaintiff in the amount of $15,468,277, after a reduction for comparative negligence and setoff for prior payments. App., *infra*, 12a.[1] The YMCA appealed the judgment to the Appellate Court of Illinois, arguing *inter alia* that the violation of its "due process rights to a fair and open proceeding" following the first trial required reinstatement of the initial jury verdict. YMCA App. Ct. Br. 31.

B. Proceedings In The Appellate Courts

The Appellate Court of Illinois affirmed. App., *infra*, 1a-25a. The appellate court rejected the YMCA's due process challenge to the trial court's failure to conduct a "formal inquiry after being told by the deputy sheriff of the jurors' comments." *Id.* at 14a. According to the appellate court, "[the] YMCA points to no support for its argument that a formal inquiry by the trial court was required." *Id.*

Finding no legal error in the trial court's decision to base its ruling on *ex parte* communications (*see* App., *infra*, 12a-13a), the court reviewed the trial court's *ex parte* factual findings for abuse of discretion. *Id.* at 12a. "This deferential standard is applied," the court reasoned, "because it is the trial court which is in the unique position of being able to observe the witnesses and how they testified, as well as all the other circumstances relating to their credibility." *Id.*

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[1] Prior to jury selection in the second trial, plaintiff voluntarily dismissed the driver, Terrell Sanderson, from the lawsuit. App., *infra*, 2a. The verdict in the first trial, however, was rendered in favor of Sanderson as well as the YMCA of Metropolitan Chicago, and if reinstated, would vindicate both parties.

Therefore, the appellate court held that "[a] trial court [is] permitted to rely upon its recollection[]" unless "the trial court's recollection [is] directly contradicted by the record." *Id.* at 14a. The court conceded that it was "unfortunate that the trial court did not inform the attorneys when his deputy sheriff informed him of the jurors' comments." *Id.* at 16a. Nevertheless, because the record did not contradict the trial judge's "recollection" that the sidebar comments "did in fact prejudice [plaintiff]"—a "recollection" based entirely on the bailiff's *ex parte* reports of the jury's statements—the appellate court upheld the ruling granting plaintiff a new trial. *Id.* at 17a.[2]

The YMCA filed a petition for rehearing, arguing that the YMCA's "rights to due process were violated by [the trial court's] decision and this Court's opinion continues to violate those rights by sanctioning conduct that is the antithesis of due process guaranteed by both the United States and the Illinois Constitutions." YMCA Pet. for Rehearing at 1. The appellate court denied the petition for rehearing. App., *infra*, 27a-28a.

The YMCA again petitioned the Supreme Court of Illinois for leave to appeal, arguing that the appellate court's decision "cannot stand under the scrutiny of the due process rights guaranteed the YMCA by both federal and state constitutions and decisional law." YMCA Pet. for Leave to Appeal at 9. The supreme court again denied leave to appeal. App., *in-*

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[2] The appellate court also relied on the fact that the judge's findings based on *ex parte* communications "were accompanied by comments regarding his own observations." App., *infra*, 16a. The *ex parte* communications, however, were the sole basis for the trial court's finding that plaintiff was actually prejudiced by the allegedly loud sidebar comments. *See id.* at 32a-35a. In addition, as the trial judge conceded, his personal observations do not appear in the trial record. *Id.* at 33a.

fra, 28a. The YMCA moved for leave to file a motion for reconsideration, which was also denied. *Id.* at 29a-30a.

REASONS FOR GRANTING THE PETITION

This Court's review is necessary to resolve the profoundly important question whether a judge's reliance on off-the-record, *ex parte* communications to alter the outcome of a trial violates the Due Process Clause or is instead permissible in the absence of contradictory record evidence. That question has divided the state appellate courts and is of recurring significance in litigation across the Nation. The prohibition against *ex parte* communications has deep roots in English common law and American jurisprudence—including prior decisions of this Court. The appellate court's decision, which granted trial courts broad discretion to rely on *ex parte* communications to award a new trial, conflicts with this Court's standard for evaluating *ex parte* communications and with decisions of several state courts of last resort.

In *Gagnon*, 470 U.S. 522, this Court acknowledged due process limitations on *ex parte* contacts between a judge and jury, but found that the particular contacts at issue were too peripheral to the trial to violate the Constitution. Here, by contrast, there is no need to speculate whether the *ex parte* communications influenced the factfinder or whether that influence prejudiced the YMCA; rather, the trial court's ruling makes plain that it overturned the YMCA's favorable jury verdict based on factual findings derived from impermissible *ex parte* discussions. This case thus presents an ideal vehicle for the Court to identify the circumstances in which judicial reliance on *ex parte* communications violates due process.

I. THE DECISION BELOW IS INCONSISTENT WITH THIS COURT'S DUE PROCESS JURISPRUDENCE

The Due Process Clause guarantees that, "where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the . . . case must be disclosed to the individual so that he has an opportunity to show that it is untrue." *Greene v. McElroy*, 360 U.S. 474, 496 (1959). In this case, the Illinois courts deprived the YMCA of a favorable verdict based on a factual finding of juror prejudice. That finding derived from *ex parte* contacts with undisclosed members of the jury and the bailiff, which were kept hidden from the YMCA until long after trial, when the court overturned the verdict. The appellate court then cloaked these unilateral findings with highly deferential "abuse of discretion" review—a standard reserved for facts that have been tested in open court through the adversary presentation of evidence. The appellate court's ruling granting the trial court broad discretion to rely on *ex parte* evidence to alter the outcome of a trial violates core historical notions of due process, and conflicts with *Gagnon*, *Greene*, and other longstanding precedents of this Court.

A. The Decision Below Is Contrary To The History And Purpose Of The Due Process Clause

The due process prohibition on *ex parte* communications between witnesses and officers of the Court has origins deep in English and early American law and history. "The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star

Chamber, and to the French monarchy's abuse of the *lettre de cachet*." *In re Oliver*, 333 U.S. 257, 268-69 (1948). A common link in these historical examples of arbitrary judicial power was the decision-maker's ability to examine witnesses or other evidence in secret without providing the accused with an opportunity to be heard. *See, e.g., id.* at 268 n.21 (during the Inquisition, the "questioning of witnesses . . . [was] conducted in secret"); *id.* at 269 n.22 (in the Court of Star Chamber, "witnesses against the accused were examined privately with no opportunity . . . to discredit them") (citing authorities); *id.* at n.23 (*lettres de cachet* provided an accused with no "trial or . . . opportunity to defend himself").[3] In one particularly egregious example well known to the American colonists, Sir Walter Raleigh was convicted of treason based on an alleged accomplice's *ex parte* testimony before the Privy Council and in a written letter—despite Raleigh's request to bring the accuser into open court. *See Crawford v. Washington*, 541 U.S. 36, 44 (2004). A judge in Raleigh's Case later lamented that "the justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh." *Id.* (internal citation omitted).

In reaction to these historical abuses, the English common law gradually evolved to provide for public examination of witnesses before the accused. As Blackstone observed, "[the] open examination of witnesses *viva voce*, in the presence of all mankind,

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[3] *See also* Emory Washburn, *The Court of Star Chamber*, 12 Am. L. Rev. 21, 25 (1877) ("Every one familiar at all with the trial of causes knows how vastly superior in eliciting the truth is . . . an oral examination of witnesses in the presence of [the parties, the jurors, and] the court to an *ex parte* one taken in the form of depositions. And yet [in the Court of Star Chamber] the latter was the mode in which all evidence was taken which was submitted to this court.").

is much more conducive to the clearing up of truth, than the private and secret examination taken down in writing before an officer, or his clerk . . . : where a witness may frequently depose that in private, which he will be ashamed to testify in a public and solemn trial." William Blackstone, 3 *Commentaries on the Laws of England* 373 (1768). Hale likewise applauded the development of the modern English system whereby evidence was presented in open court, "in [the] presence of the judge, jury, parties and counsel," rather than "in private before a commissioner or two, and a couple of clerks; where oftentimes witnesses will deliver that, which they will be ashamed to testify publicly." Matthew Hale, 2 *The History of the Common Law* 145 (5th ed. 1794). In sum, "[t]he common-law tradition is one of live testimony in court subject to adversarial testing, while the [continental] civil law condone[d] examination in private by judicial officers." *Crawford*, 541 U.S. at 43.

The founding generation sought to prevent the reoccurrence of abuses like the Star Chamber through enactment of the Bill of Rights—for example, the Confrontation Clause of the Sixth Amendment, which provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI; *see also Crawford*, 541 U.S. at 49. In the civil context, the Due Process Clause of the Fifth and Fourteenth Amendments protects the fundamental rights of litigants to be present and to confront adverse witnesses. *See Greene*, 360 U.S. at 496 & n.25, 497 (noting that these rights have "ancient roots" in Roman law and apply under the U.S. Constitution "not only in criminal cases, but also in all types of cases where administrative and regulatory actions [are] under scrutiny") (internal citations omitted); 22 Wright & Graham, *Federal Practice and Procedure:*

Evidence § 5195, at 202 (1978) ("[t]hough by its own terms the Sixth Amendment right is limited to criminal cases, it has been held that a right of confrontation is a requirement of due process and as such is applicable in proceedings that are not criminal in nature").

Thus, from an early date, this Court recognized that the core requirements of due process include "notice and an opportunity to be heard." *Hagar v. Reclamation Dist. No. 108*, 111 U.S. 701, 709 (1884); *see also Louisville & Nashville R.R. Co. v. Schmidt*, 177 U.S. 230, 236 (1900) (due process requires that "the person condemned has . . . sufficient notice and adequate opportunity has been afforded him to defend"); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914) ("The fundamental requisite of due process of law is the opportunity to be heard.").[4] Early precedents also recognized that the Due Process Clause protects the right of a defendant to be present at all stages of a proceeding that could affect the defendant's rights in the litigation. *See, e.g.*, *Hopt v. Utah*, 110 U.S. 574, 579 (1884) (noting in dicta that due process encompasses the right of the defendant to "be personally present at the trial, that is, at every stage of the trial when his substantial rights may be affected by the proceedings against him").

Then, in *Snyder v. Massachusetts*, this Court explained that "the presence of a defendant is a condition of due process to the extent that a fair and just

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[4] These requirements remain the foundation of this Court's due process jurisprudence. *See, e.g.*, *Mathews v. Eldridge*, 424 U.S. 319, 332-33 (1976) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'") (internal citation omitted); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (same).

hearing would be thwarted by his absence . . . ." 291 U.S. at 107-08. The Court has continued to affirm in more recent cases that a defendant has the right to be present at all critical stages of a trial proceeding. *See, e.g.*, *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975) (as a matter of "due process of law," "[i]t is now accepted . . . that an accused has a right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings"); *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987) (the Due Process Clause "guarantee[s] the [defendant's] right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure").

This Court has applied these general due process principles in a variety of circumstances in civil cases to prevent decision-makers from relying on *ex parte* evidence that would affect the rights of parties or the fairness of a hearing. For example, in *Southern Railway Company v. Virginia*, 290 U.S. 190 (1933), the Court held that it violated due process for a State to empower an administrative officer to "make final determination in respect of facts" relating to the safety of railway crossings, and based on these "*ex parte* finding[s], not subject to general review, to ordain that expenditures shall be made [by the railroad] for erecting" an overhead passage. *Id.* at 194-95. Similarly, in *Morgan v. United States*, 304 U.S. 1 (1938) (*per curiam*), this Court considered whether reliance on *ex parte* evidence was consistent with Congress's requirement of a "full hearing" under the Packers and Stockyards Act. The Court held that in requiring a "full hearing," Congress had incorporated "those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature." *Id.* at 19. Therefore, the Court concluded that it was a "vital defect" for the Secretary of Agriculture to fix maximum rates to be charged by

market agencies based on findings drafted by the government prosecutors "after an *ex parte* discussion with them and without according any reasonable opportunity to the [market agencies] to know the claims thus presented and to contest them." *Id.* at 22.

In *Greene*, the Department of Defense had revoked an aeronautical engineer's security clearance, which made it impossible for him to find work in the field, based on confidential informants who allegedly testified that the engineer associated with members of the Communist Party. 360 U.S. at 487-89. Because neither Congress nor the President had expressly authorized the Department to deny security clearances based on information derived from secret informants, this Court "assumed that Congress or the President intended to afford those affected by the action the traditional safeguards of due process." *Id.* at 507. Given those safeguards, the Court concluded that the Department had improperly exceeded its authority by depriving the engineer of his livelihood "on the basis of a fact determination rendered after a hearing which failed to comport with our traditional ideas of fair procedure," including "the safeguards of confrontation and cross-examination." *Id.* at 508.

Finally, in *Willner v. Committee on Character & Fitness*, 373 U.S. 96 (1963), this Court held that it violated due process to deny an applicant bar admission based, "at least to some extent," on adverse *ex parte* statements that were not tested by a hearing and opportunity to confront adverse witnesses. *Id.* at 101, 106. The applicant challenged the constitutionality of this procedure, but the state courts rejected his challenges without extended analysis. *Id.* at 101-02. This Court reversed. The Court noted that it "ha[d] emphasized in recent years that procedural due process often requires confrontation and cross-examination of those whose word deprives a person

of his livelihood." *Id.* at 103 (citing *Greene*, 360 U.S. at 492, 496-97). Therefore, "the need for confrontation is a necessary conclusion from the requirements of procedural due process in a situation such as this." *Id.* at 104.

The trial court's ruling in this case offends the purpose and storied history of the Due Process Clause because the trial judge relied on factual findings of juror prejudice—obtained through *ex parte* conversations outside the presence of the parties or their counsel—to grant plaintiff a new trial. The appellate court, in turn, disregarded the longstanding tradition against reliance on *ex parte* communications by holding that trial judges possess discretion to base dispositive rulings on *ex parte* communications.

This Court should grant review because the appellate court's decision ratifying the discretionary use of *ex parte* evidence not "directly contradicted by the record" (App., *infra*, 14a) conflicts with numerous decisions of this Court affirming the foundational due process requirements of notice, personal presence, and an opportunity to be heard at all critical stages of a trial proceeding. Certiorari is also warranted to clarify that, where a factfinder's reliance on *ex parte* communications affects a party's substantial rights, a defendant has been deprived of its historical right to a "fair and just hearing." *Snyder*, 291 U.S. at 108.

B. The Decision Below Is Inconsistent With This Court's Prior Decisions Concerning *Ex Parte* Communications Between A Judge And Juror

A specific line of this Court's precedents dating back 90 years has repeatedly affirmed that *ex parte* communications between a judge and jury violate a

defendant's right to a fair hearing—as a matter of trial procedure and constitutional due process. The appellate court's ruling conflicts with the letter and spirit of these cases.

In *Fillippon v. Albion Vein Slate Co.*, 250 U.S. 76 (1919), a civil action for negligence, the jury asked the judge during deliberations to clarify the proper standard for contributory negligence, and the judge responded with a written instruction—outside the presence of, and without notice to, the parties or their counsel. This Court held, using language sounding in due process, that the judge's actions violated the defendant's "right to be heard." *Id.* at 81. "We entertain no doubt," the Court wrote, "that the orderly conduct of a trial by jury, essential to the proper protection of the right to be heard, entitles the parties who attend for the purpose to be present in person or by counsel at all proceedings from the time the jury is impaneled until it is discharged after rendering the verdict." *Id.* at 81.

The Court returned to this issue in *Shields v. United States*, 273 U.S. 583, 584 (1927). In that case, a jury sent a note to the trial judge indicating it was deadlocked with respect to defendant Shields, and the judge responded with a written request that the jury continue deliberations—but the entire exchange took place outside the presence of Shields or his counsel. Even though defense counsel had previously asked the judge to hold the jury until it reached a decision, the Supreme Court held, relying on *Fillippon*, that the "rule of orderly conduct of [a] jury trial" was violated when the judge sent the reply in the defendant's absence. *Id.* at 588-89.

Perhaps the Court's clearest condemnation of *ex parte* communications between judge and jury occurred in *Remmer v. United States*, 347 U.S. 227 (1954). In *Remmer*, a juror reported to the judge

that he had been contacted by an unnamed person who told the juror he could profit by returning a favorable verdict for the defendant. *See id.* at 228. The judge, in consultation with the prosecutors, but without informing the defendant, asked the FBI to conduct an investigation into the allegations. *See id.* The investigation revealed that the inducement was likely not serious, and the juror remained on the panel, which ultimately returned a verdict against the defendant. *See id.*

Upon learning of the investigation, the defendant filed a motion for a new trial, which the district court denied. *See id.* at 228-29. This Court reversed, reasoning that "any private communication . . . with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial[.]" *Id.* at 229. "The trial court should not decide and take final action *ex parte* on information . . . received [from a juror], but should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate." *Id.* at 229-30.

Because some of these early cases may have rested their holdings on "non-constitutionally based rules of orderly trial procedure," *Rushen v. Spain*, 464 U.S. 114, 120 n.4 (1983) (*per curiam*) (describing *Fillippon* and *Shields*) (dicta), rather than the Due Process Clause itself, "it has seldom been necessary to plumb the federal constitutional depths of the principle" that there are due process limits to *ex parte* communications between a judge and jury. *Bustamante v. Eyman*, 456 F.2d 269, 272 (9th Cir. 1972). "Nevertheless, that the principle is embodied in the Constitution of the United States is clear."

Id.[5] Indeed, there can be no doubt, after this Court's decisions in *Rushen* and *Gagnon*, that the Due Process Clause places limitations on *ex parte* communications between a judge and jury.

In *Rushen*, the prosecution in a criminal trial introduced evidence of an unrelated murder to impeach a witness, which distressed one of the jurors who knew the murder victim personally. 464 U.S. at 115. The juror had two *ex parte* conversations about the murder with the judge, who concluded that the matter was peripheral to the facts of the case and would not affect her impartiality. *Id.* at 116. The defendants were convicted, and argued in a new trial motion and on appeal that the *ex parte* communications violated their rights to personal presence and counsel. *Id.* at 117.

This Court acknowledged that "[o]ur cases recognize that the right to personal presence at all critical stages of the trial and the right to counsel are fundamental rights of each criminal defendant." *Id.* at 117. Further, the Court noted that "[w]hen an *ex parte* communication relates to some aspect of the trial, the trial judge generally should disclose the

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[5] For example, the history of Federal Rule of Criminal Procedure 43(a) provides evidence that cases like *Fillippon* and *Shields* reflect this Court's early understanding of constitutional limits on *ex parte* communications. The Rule, adopted in 1944, provides that a criminal defendant has a right to be present "at . . . every trial stage, including jury impanelment and the return of the verdict." Fed. R. Crim. P. 43(a). Courts have observed that the Rule codified prior case law, and "embodies the protections afforded by the sixth amendment confrontation clause, the due process guarantee of the fifth and fourteenth amendments, and the common law right of presence." *United States v. Gordon*, 829 F.2d 119, 123 (D.C. Cir. 1987); *see also United States v. Washington*, 705 F.2d 489, 496 (D.C. Cir. 1983) (same).

communication to counsel for all parties." *Id.* at 119. Nevertheless, the Court found that on the facts before it, the *ex parte* communications were harmless error, because the conversations were "innocuous" and unrelated to the facts and law of the case. *Id.* at 121.[6]

Then, in *Gagnon*, a bailiff informed the trial judge that a juror had expressed concern that Gagnon, one of four criminal defendants, was sketching portraits of the jury. 470 U.S. at 523. The judge conducted an *in camera* interview with Gagnon's counsel and the juror, which concluded that the juror could be impartial and remain empanelled. *Id.* at 524. The defendants were convicted, and on appeal the Ninth Circuit held that the *in camera* discussion violated the defendants' due process right to be personally present at all stages of the trial. *Id.* at 524-25.

This Court acknowledged that a defendant has a due process right to be present at a proceeding whenever such presence has a "relation, reasonably substantial, to the fulness of his opportunity to defend against [a] charge," or "a fair and just hearing would be thwarted by his absence . . . ." *Gagnon*, 470 U.S. at 526 (quoting *Snyder*, 291 U.S. at 105-06, 108). The Court concluded, however, that on the specific facts of that case, no due process violation had occurred: The sketching incident was a "short interlude in a complex trial," "a minor occurrence," and the defendants could not have gained anything by being personally present. *Id.* at 527.

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[6] The Court assumed, without deciding, that the *ex parte* conversations violated the Constitution, and considered only whether the error was harmless. *See* 464 U.S. at 117 n.2.

C. The Standard Applied By The Appellate Court Conflicts With The Standard Employed By This Court

The decision below conflicts with the principles articulated in cases like *Snyder* and *Gagnon*, because it upholds the power of a trial court to predicate a dispositive ruling on *ex parte* evidence about the impact of particular conduct on the jury. This Court's precedents make plain that reliance on *ex parte* evidence is "presumptively prejudicial," *Remmer*, 347 U.S. at 229, and that a defendant has a right to be present whenever presence has a "reasonably substantial" relation to mounting a full and fair defense, *Gagnon*, 470 U.S. at 526 (quoting *Snyder*, 291 U.S. at 105). The court below, however, adopted and applied a contrary presumption, holding that a trial judge has broad discretion to grant a new trial based on *ex parte* evidence as long as the judge's factual findings are not "directly contradicted" by the record. App., *infra*, 14a.

The appellate court's rule would eviscerate this Court's longstanding distrust of reliance on secret, *ex parte* evidence and make it impossible for parties like the YMCA to create a meaningful record for appellate review. By definition, *ex parte* communications occur without notice to the adversely affected party. *See Black's Law Dictionary* 616 (8th ed. 2004) (defining an *ex parte* action in part as "[d]one . . . for the benefit of one party only, and without notice to, or argument by, any person adversely interested"). Parties in the YMCA's position have no ability or incentive to create a factual record to refute unknown and unknowable *ex parte* statements. The trial court compounded this difficulty through its belated reliance on *ex parte* communications to grant plaintiff a new trial many months after the verdict was returned and the jury dismissed. As the trial judge

admitted, at that point in time it was impossible for the YMCA to evaluate the impartiality of the verdict: "The outcome, the verdicts could have, might have been the same. I and we will never know." App., *infra*, 34a.

Under such circumstances, the record will rarely, if ever, "directly contradict[]" previously undisclosed *ex parte* communications. Here, the record does not reflect the two key factual predicates of the trial court's ruling—that the jurors (a) overheard the parties' sidebar discussions, and (b) were prejudiced as a result. As the trial judge conceded, the "transcript . . . does not reflect" his "direct observation" of the court's inability to prevent the jurors from overhearing the sidebar discussions. App., *infra*, 33a. And of course, the *ex parte* conversations between the judge, deputy sheriff, and jury appear nowhere in the record. Therefore, the appellate court had no valid basis on which to uphold the trial court's factual findings, and certainly no basis to apply a "deferential standard" to such findings. *Id.* at 12a.

By contrast, this Court has deemed *ex parte* contacts between a judge and juror "presumptively prejudicial" and found that reliance on *ex parte* evidence violates the Constitution in circumstances where it would undermine the fairness of proceedings or affect the rights of litigants. *See, e.g.*, *S. Ry. Co.*, 290 U.S. at 194-95; *Willner*, 373 U.S. at 101, 106; *see also Fillippon*, 250 U.S. at 81; *Remmer*, 347 U.S. at 229. In *Southern Railway Company* and *Willner*, the Court did not inquire whether the facts derived from the *ex parte* communications were refuted by record evidence; rather, it was sufficient that the factfinder relied on such evidence without providing the adversely affected party with notice and an opportunity to be heard. The appellate court's holding below, which grants trial courts broad discretion to rely on *ex parte* communications, is in-

consistent with these cases and with this Court's repeated admonition that a defendant has a right to be present whenever there is a "relation, reasonably substantial," to the defendant's ability to defend itself. *Gagnon*, 470 U.S. at 526 (quoting *Snyder*, 291 U.S. at 105).

To be sure, in *Rushen* and *Gagnon*, this Court held that the specific *ex parte* contacts between judge and jury in those cases were "innocuous" or "minor" occurrences, and therefore did not violate due process or amount to more than harmless error. Plainly, however, the same cannot be said here: The trial judge explicitly relied on *ex parte* communications to grant plaintiff a new trial. App., *infra*, 34a. Indeed, unlike in *Gagnon*, the YMCA's counsel had no opportunity to identify or question the allegedly affected jurors, who had long since been dismissed. Rather, the YMCA was denied any right to be present and cross-examine the jurors at a meaningful time when it could have protected its interests and evaluated the extent of any prejudice. In such circumstances, the trial judge's reliance on *ex parte* hearsay communications from the jury conflicts with this Court's guarantee of a "fair and just hearing." *Snyder*, 291 U.S. at 108.

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In his dissent in *Gagnon*, Justice Brennan noted that the Court had not articulated a precise standard for determining when *ex parte* communications between a judge and jury violate due process: "No guiding standard for future application is provided; the Court simply invokes its power to decide *this* case. Such ad hoc resolutions invariably engender more problems than solutions for lower courts." 470 U.S. at 531 (Brennan, J., dissenting) (emphasis in original). Although the Court in *Gagnon* found no constitutional error on the peculiar facts of that

case—because the factfinder was likely not influenced by the *ex parte* communications—it did not establish a rule that actual, demonstrated reliance on *ex parte* communications is favored or even permissible. On the contrary, the great weight of this Court's precedents reflects the view that reliance on *ex parte* communications is highly disfavored.

Because the Illinois appellate court's approach, contrary to this Court's decisions, would actually favor and encourage judicial reliance on *ex parte* communications, certiorari is warranted for that reason alone. But this case also provides an ideal vehicle for the Court to resolve the issue of law left open by *Gagnon* and identified by Justice Brennan: the precise circumstances in which *ex parte* communications between a judge and juror violate due process.

This Court's cases clearly point toward a bright-line rule to govern such cases: Whenever a court relies on *ex parte* communications to reach a decision that affects substantial rights, it violates due process. *E.g.*, *Hopt*, 110 U.S. at 579 (presence required "at every stage of the trial when . . . *substantial rights may be affected*"); *Snyder*, 291 U.S. at 107-08 ("the presence of a defendant is a condition of due process to the extent that *a fair and just hearing would be thwarted* by his absence"); *Stincer*, 482 U.S. at 745 (1987) (presence "guaranteed . . . at any stage of the . . . proceeding that is *critical to its outcome*") (emphases added). This Court's review is warranted to clarify that, in keeping with the principles enunciated in this Court's precedents, the Due Process Clause forbids judicial reliance on *ex parte* communications to alter the outcome of a trial or otherwise affect a litigant's substantial rights.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS FROM STATE COURTS OF LAST RESORT

The decision below also conflicts with decisions from several state supreme courts holding that a judge may not rely on *ex parte* communications to affect the outcome of litigation. As noted above, Justice Brennan predicted in his *Gagnon* dissent that the majority's failure to articulate a clear rule to identify when reliance on *ex parte* communications violates due process would "invariably engender more problems than solutions for lower courts." 470 U.S. at 531. Those concerns have indeed come to pass: The appellate court's decision here conflicts with several state supreme court decisions holding that due process prohibits reliance on *ex parte* communications to affect substantial rights. Certiorari is warranted to resolve the conflict between the decision below and these appellate precedents.

In *Yost v. Johnson*, 591 A.2d 178 (Del. 1991), the Supreme Court of Delaware held that a Delaware family court judge violated due process by relying on an *ex parte* conversation to rule on a motion to dismiss in a custody dispute. In *Yost*, the child's mother argued that the family court lacked jurisdiction, and the judge denied the motion based on facts developed in an *ex parte* conversation with a Virginia judge. *See id.* at 180-81. There was no written record of the *ex parte* conversation and no written decision recording the key jurisdictional fact, namely, whether the Virginia judge had earlier deferred the same custody dispute. *See id.* at 181.

The Supreme Court of Delaware held that "the trial court's *ex parte* communication with the Virginia judge resulted in a serious violation of [the mother's] constitutional right to procedural due process." *Id.* at 181. The trial court failed to notify the

parties of its contact with the Virginia judge, and there was "no evidence that the Family Court kept a written record of the conversation." *Id.* at 182. Therefore, the trial court had violated its "fundamental duty to notify the parties of the intended communication in advance, and to permit them to meaningfully participate in the discussion." *Id.* "Anything less," the court concluded, "does not comport with basic principles of due process." *Id.*

Similarly, in *Ex parte R.D.N.*, 918 So. 2d 100 (Ala. 2005), another custody dispute, the Supreme Court of Alabama held that a trial court violated due process by predicating a custody ruling on an *ex parte* recommendation from the child's guardian at litem. The recommendation "was not presented as evidence produced in open court and was based on information that may or may not have been properly presented to the court." *Id.* at 104. Therefore, the Court concluded that "the trial court's ex parte communications with the guardian ad litem and its reliance upon her recommendation . . . violated the fundamental right of the father to procedural due process." *Id.* at 105.

The Mississippi Supreme Court reached a similar conclusion in *Whitney National Bank v. Smith*, 613 So. 2d 312 (Miss. 1993) (*en banc*), which held that a lower-court judge violated due process by amending a judgment from dismissal "without prejudice" to "with prejudice" following an *ex parte* request from one party—without notice to the opposing party that would be prejudiced by the order. The court held that "the procedure utilized egregiously offends all notions of due process and acceptable conduct." *Id.* at 313.

The decision below squarely conflicts with the decisions in *Yost*, *Ex parte R.D.N.*, and *Whitney*. Each of those state appellate courts concluded, with-

out hesitation and as a matter of law, that it violates due process for a court to rely on *ex parte* communications to determine the outcome of a case or otherwise affect a party's substantial rights. By stark contrast, the Illinois appellate court below concluded that it was within the trial court's discretion—subject only to clear refutation by the record—to rely on *ex parte* communications as a basis for granting plaintiff a new trial. That holding is irreconcilable with decisions of the Delaware, Alabama, and Mississippi appellate courts. Therefore, this Court should grant certiorari to resolve the conflict among the state courts.

III. THE DUE PROCESS ISSUE THAT HAS DIVIDED THE LOWER COURTS IS RECURRING AND EXCEPTIONALLY IMPORTANT

The due process issue raised in this petition—one that has recurred throughout this Court's history—has profound implications for the fair administration of justice in the United States. It is a central tenet of our adversary system, and a foundation for the public's trust in the courts, that judges should not render decisions based on secret evidence (including *ex parte* communications) presented off the record and outside the presence of an adversely affected party. *See, e.g.*, *United States v. Nixon*, 418 U.S. 683, 709 (1974) ("The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. . . . The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts."). The appellate court's ruling, however, effectively immunizes trial judges who rely on *ex parte* evidence to decide cases, except in circumstances where their factual findings are belied by the record. Such patent disregard for basic due process principles requires this Court's intervention, as the Nation's final arbiter of the constitu-

tional standards governing the administration of justice. *See, e.g.*, *Caperton v. A. T. Massey Coal Co.*, 129 S. Ct. 2252, 2265 (2009) (noting that "this Court's intervention and formulation of objective standards" is particularly appropriate in cases raising clear due process violations).

Besides being unconstitutional and fundamentally unfair to the affected party, basing a decision on *ex parte* contacts between judges and jurors is also fraught with potential to lead to erroneous results. As this Court has observed, "[a]ny *ex parte* meeting or communication between the judge and . . . a deliberating jury is pregnant with possibilities for error. . . . [E]ven an experienced trial judge cannot be certain to avoid all the pitfalls inherent in such an enterprise." *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 460 (1978). In some cases, a judge's *ex parte* contact with a jury will improperly influence the verdict, as jurors are liable to misinterpret offhand statements made by a judge as binding instructions. *See id.* at 460-61. In other cases, as here, a judge may extrapolate isolated comments allegedly made by jurors into a finding that the jury was prejudiced, requiring a new trial. In either case, because the communication was not subjected to the scrutiny of open proceedings and the adversary system, the likelihood of error is enhanced. *See, e.g.*, *Greene*, 360 U.S. at 497-98 ("probing questions" asked of an absent witness will "often uncover inconsistencies, lapses of recollection, and bias"). Indeed, that danger was multiplied exponentially in this case, because the *ex parte* conversations contained double hearsay; *i.e.*, alleged communications from the jurors to the deputy sheriff to the judge. Absent review by this Court, factfinders like the trial judge below will continue to rely on *ex parte* evidence, impairing the quality of decision-making and violating the rights of litigants like the YMCA.

Further, without additional guidance from this Court, lower courts will continue to divide on whether—and in what circumstances—due process allows a factfinder to rely on *ex parte* communications to render a decision. Properly understood, the Due Process Clause forbids reliance on *ex parte* communications to affect substantial rights. This Court should grant review to provide a clear, uniform rule for the lower courts on this important constitutional issue and protect the rights of parties like the YMCA to a fair and open trial.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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